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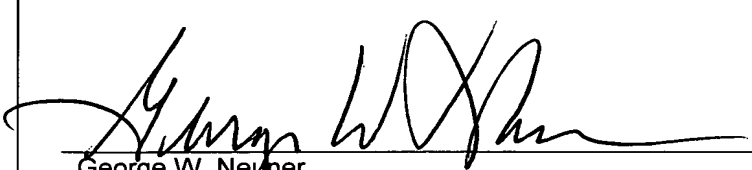
TRANSMITTAL OF APPEAL BRIEF

Docket No.
48641CPA(71923)

In re Application of: Daniel F. Lyman

Application No.
09/417,428Filing Date
October 13, 1999Examiner
J. A. RicciGroup Art Unit
3711

Invention: ENTERTAINMENT AND STRESS RELIEF DISK

TO THE COMMISSIONER OF PATENTS:Transmitted herewith is the Appeal Brief in this application, with respect to the Notice of Appeal
filed: September 6, 2006*****THE FEE FOR FILING APPEAL BRIEF WAS PREVIOUSLY PAID IN SUSPENDED APPEAL*****☒ A petition for extension of time is enclosed.The fee for the extension of time is \$ 60.00☐ A check in the amount of _____ is enclosed.☒ Charge the amount of the fee to Deposit Account No. 04-1105
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Attorney Reg. No. : 26,964

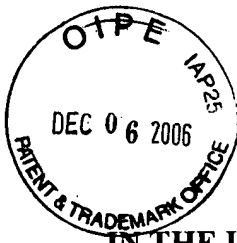
EDWARDS ANGELL PALMER & DODGE LLP

P.O. Box 55874

Boston, Massachusetts 02205

(617) 517-5538

Dated: December 6, 2006



Attorney Docket No. 48641 (71923)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Lyman

CONFIRMATION: 7415

U.S.S.N.: 09/417,428

GROUP ART: 3711

FILED: October 13, 1999

EXAMINER: John A. Ricci

FOR: ENTERTAINMENT AND STRESS RELIEF DISK

Mail Stop Appeal Brief—Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

BRIEF ON APPEAL

Sir:

This is an appeal from the final rejection of claims 1-6, 8, 9 and 15-17, as included in the Final Office Action mailed by the U.S. Patent and Trademark Office on June 7, 2006.

BRIEF ON APPEAL FEE

A prior appeal brief was filed February 6, 2004 with payment of appeal brief fee in this application and, subsequently, the application **withdrawn from appeal by the Examiner**. Thus, it is believed that no fee is presently due for this appeal brief. However, if for any reason a fee is required, a fee paid is inadequate or credit is owed for any excess fee paid, the Commissioner is hereby authorized and requested to charge or credit Deposit Account No. **04-1105**.

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Claims Appendix:	Claims 1-6, 8, 9 and 15-17 on appeal
Evidence Appendix:	(A) Copy of Jorgensen et al. US Pat. No. 3,414,186
Related Proceedings Appendix:	None

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REAL PARTY IN INTEREST

The real party in interest is Daniel F. Lyman, an individual.

RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to Appellant or Appellant's legal representative, which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

A prior appeal was filed with brief in this application, but the Examiner withdrew the application from appeal.

STATUS OF CLAIMS

Claims 1-17 have been presented in this application. In the Office Action Summary, Claims 10-12 are allowed, Claims 1-6, 8, 9 and 15-17 stand finally rejected and objection is made to Claims 7, 13 and 14. However, in the Office Action, it is stated that objection is made to Claims 13-15 and there is no reference to claim 7.

The rejected Claims are set forth in the Appendix attached hereto.

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STATUS OF AMENDMENTS

No Amendment was filed on after the final rejection dated June 7, 2006. The last Amendment was filed on February 28, 2006.

A clean set of the claims on appeal is set forth in the Claims Appendix hereto.

SUMMARY OF CLAIMED SUBJECT MATTER

Independent claims 1, 5 and 10 are pending in the application.

The present invention relates to a passive diversion device for entertainment and stress relief. In particular, the device has two surfaces separated by a small distance and is configured to provide two stable equilibrium positions, one having a convex shape and the other having a concave shape when viewed from the same direction. The largest average dimension of the surfaces is substantially greater than the thickness of the device. By applying finger pressure to a surface of the device, the surfaces invert from one equilibrium position to the other. [Page 1, lines 3-10]

The present invention provides a simple, inexpensive device that can be used for passive entertainment and stress relief through manual manipulation of the device. The device may be manufactured with varying degrees of stiffness, sizes, texture, color and scent so that individuals may chose a device based on personal preferences. The device may additionally be adapted to change color and/or produce sound upon manipulation. [Page 2, lines 11-16]

In accord with the invention, an amusement and stress relief device comprises a flexible material formed into a disk-like shape having two opposite surfaces, a center portion and a peripheral portion, wherein the center portion has a convex/concave shape relative to the peripheral portion, and wherein the device is stable in two positions, a first stable position where a first surface is concave and a second surface is convex and a second stable position where the first surface is convex and the second surface is concave. The center portion protrudes out of a plane containing the peripheral portion. The disk-like device preferably has a circular peripheral edge, but can be formed with any shape peripheral edge. [Page 2, lines 18-27]

In claim 1, the device of the present invention includes a peripheral lip portion **1** and a center portion **2** surrounded by the lip portion **1**. The device has an upper surface **3** and a lower surface **4**, one surface being concave and the other surface being convex. The concavity and convexity of the surfaces **3**, **4** are interchangeable. In other words, the device has two stable equilibrium positions, one being the concave upper surface **3** with convex lower surface **4** and

the other being the convex upper surface **3** with concave lower surface **4**. Manual manipulation of the device inverts the surface from one equilibrium position to the other. The concave surface **3** or **4** preferably has a single peak **5** in the middle of the center portion **2**. The device, however, may have more than one peak **5**, provided that the two equilibrium positions as described are present in the device. [Page 3, lines 18-29; Figs. 1-4]

The amusement and stress relief device is formed of a flexible, resilient polymeric material having a center portion with a concave/convex shape, wherein the device has **two stable equilibrium positions** wherein a first equilibrium position comprises a first surface having a concave shape and a second surface having a convex shape and a second equilibrium position is the reverse or inverse of the first equilibrium position and comprises the second surface having a concave shape and the first surface having a convex shape. In other words, the second stable equilibrium position is the reverse or inverse of the first stable equilibrium position. The device of the present invention **requires** manual manipulation to be moved from one stable equilibrium position to the other, no matter which stable equilibrium position it is in. Further, the two equilibrium positions have substantially the same shape or appearance.

The nature of the present invention can be readily seen by examining the samples of the device that were previously submitted with the AMENDMENT AFTER FINAL REJECTION mailed January 25, 2001.

In claim 2, the disk has an overall diameter d ranging between about 0.75 inch and about 6 inches. [Page 4, lines 7-9]

In claim 3, the lip is sized such that the ratio of the width w of the lip to the diameter d is a maximum of about $1/4$. [Page 4, lines 9-11]

In claim 4, w/d is in the range of about $1/30$ to about $1/5$. [Page 4, line 12]

In claim 5, the disk has a substantially uniform cross-sectional thickness t , and the ratio of t/d is a maximum of about $1/10$. [Page 4, lines 20-22]

In claim 6, the ratio of t/d is in the range of about $1/80$ to about $1/15$. [Page 4, lines 22-23]

In claim 8, the height h_p of the peak(s) **5** above the peripheral lip **2** or the plane containing

the peripheral edge of the device, illustrated in Figures 2 and 3, has a ratio of h_p/d that is a maximum of about 1/3. [Page 5, lines 1-8]

In claim 9, the disk is made of ethylene-vinyl acetate. [Page 4, line 24]

In claim 16, the disk is made of a material selected from fluoroplastics, polyamides, polybutylenes, thermoplastic polyesters, polyethylene and ethylene copolymers, silicones, thermoplastic elastomers, vinyl polymers and copolymers, and blends thereof. [Page 7, line 23 – Page 8, line 2]

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The grounds of rejection to be reviewed on appeal are:

(1) Whether claims 1 and 17 are unpatentable under 35 USC §102(b) over Jorgensen et al. US 3,414,186.

(2) Whether claims 2-6, 8, 9 and 16 are unpatentable under 35 USC §103(a) over Jorgensen et al. US 3,414,186.

ARGUMENT

1. Brief summary of argument

A single Section 102(b) rejection based on a single document (Jorgensen et al.) is presented in this case. A single Section 103(a) rejection is made based on the same document. These rejections cannot be sustained.

The cited document does not disclose or otherwise suggest (explicitly or inherently) Appellant's claimed invention. In particular, the document does not disclose a hand-held diaphragm having two stable equilibrium conditions. Further, the document fails to disclose or suggest a diaphragm having a center portion with a substantially planar peripheral portion surrounding the center portion wherein the center portion has a concave first lower surface and a convex first upper surface.

The rejected claims do *not* stand or fall together since certain claims are considered separately patentable. Appellant submits that all of the claims under appeal are patentable including for reasons set forth below.

2. Examiner's position

The Examiner contends that

Jorgensen shows a device (32 or 38) including a planar peripheral portion, and a flexible center portion having an upper surface and a lower surface; the center portion having two stable positions (column 3, line 9), wherein in the first stable position, the lower surface has a concave shape, and the upper surface has a convex shape (figure 1); and in the second stable position, the lower surface has a convex shape, and the upper surface has a concave shape (figure 2). As water pressure bears against the upper surface of diaphragm 32, it is gradually forced downward. At some point **the system** of 32, 34, 36, 38 **snaps** down to the position shown in figure 2 (column 3, lines 27-42). Jorgensen suggests that the diaphragms snap abruptly when enough pressure is applied, rather than move in linear response to applied pressure, suggesting that at least one diaphragm 32, 38 is not planar, but normally has a concave surface that snaps to convex when pushed slightly overcenter. Although Jorgensen shows the device installed as part of a pump, it would be possible to hold and manipulate the device in a hand; for example, the device was likely held in a hand as the pump was being assembled.
[Emphasis added.]

With regard to claim 17, the Examiner contends that the material would inherently have some color.

With regard to claims 2-6 and 8, the Examiner contends that the flexible device shown by Jorgensen would have approximately these dimensions, and the pump would operate with these dimensions.

With respect to claims 9 and 16, the Examiner contends that making the device of a particular polymeric material would be obvious.

3. Appellant's arguments

A. The cited document does not disclose all the features of the claimed invention, explicitly or inherently.

The Jorgensen Reference

Jorgensen et al describe a **transducer** or air pump 10 that comprises a housing or body 12 with a fitting 14 at one end **for attachment to a standard water faucet** that communicates with a water inlet chamber 16. The base of the chamber is provided with a central bore 20 in which valve stem 22 is slidably mounted. The chamber also is provided with an additional bore 24 connecting the water inlet chamber 16 to the water chamber 26. [Col. 2, lines 51-64]

In operation, the fitting 14 is connected to a water faucet. With the water turned on, water enters the water inlet chamber 16 and runs through bore 24 to the water chamber 26. As the water chamber 26 fills, **the pressure of the water bearing on diaphragm 38 gradually forces the diaphragm toward the air chamber.** As this happens the **toggle actuators 34 and 36** move in such a way that the arms 35 bear against the **snap action toggle mechanism 32** and move the toggle mechanism enough to cause the toggle mechanism 32 to snap from the stable position shown in FIG. 1 to the stable position shown in FIG. 2. When this happens the toggle mechanism pulls the valve stem 22 toward the air chamber so that valve 28 abruptly closes bore or passage 24 while valve 30 abruptly opens passage 29. [Col. 3, lines 27-42]

As the valve 30 opens passage 29, the force exerted by coil spring 40 on the diaphragm moves the diaphragm toward the water chamber 26 so that the water in water chamber 26 is forced out through exit passage 29. This movement of the diaphragm carries the toggle actuators 34 and 36 with it causing arms 37, which bear against the toggle mechanism to cause it to snap back to the stable position shown in FIG. 1. [Col. 3, lines 54-61]

Further, with respect to two equilibrium conditions, Jorgenson teaches that

Valve stem 22 is also connected to the hinge of a snap toggle mechanism 32. This snap toggle mechanism is movable between the two stable positions The toggle actuators are generally F-shaped in the diagram, and have arms 35 and 37 which

move with the diaphragm.
[Col. 3, lines 7-18]

It can be seen in the diagrams that the diaphragm is held by the side walls of the transducer. There is no suggestion here that the diaphragm *per se* could have two stable equilibrium conditions.

Jorgenson further discloses at Col. 3, lines 31-38:

As the water chamber 26 fills, the pressure of the water bearing [on] the diaphragm 38 gradually forces the diaphragm toward the air chamber. As this happens the **toggle actuators 34 and 36 move** in such a way that the arms 35 bear against the snap action toggle mechanism 32 and move **the toggle mechanism enough to cause the toggle mechanism to snap from the stable position shown in FIG. 1 to the stable position shown in FIG. 2.**
[Emphasis added.]

B. The Jorgensen reference does not anticipate the pending claims.

(i) Claims 1 and 17

It is well-established that a claim is anticipated only if each and every element or feature of a claim is expressly or inherently described in a single prior art reference. See, e.g., MPEP 2131.

As seen above, Jorgenson teaches that the **toggle mechanism**, *not the diaphragm*, has the two stable positions.

The Examiner acknowledges that it is the system of 32, 34, 36 and 38 that snaps into a second stable position (see quotation above), yet, contends that the diaphragm snaps abruptly. There is no support for the Examiner's conclusion that the diaphragm snaps abruptly. Indeed, Jorgensen states that "the **toggle actuators 34 and 36 move** in such a way that the arms 35 bear against the snap action toggle mechanism 32 and move **the toggle mechanism enough to cause the toggle mechanism to snap from the stable position shown in FIG. 1 to the stable position shown in FIG. 2.**"

Thus, there is no teaching or suggestion in Jorgensen for a hand-held flexible, resilient,

polymeric device having two stable equilibrium positions as claimed herein.

Appellant agrees that the diaphragm of Jorgenson may well have been held in a hand as the pump was being assembled. However, nothing in Jorgenson teaches or suggests that the diaphragm itself has two stable equilibrium conditions. The drawings suggest that the diaphragm is a sheet of an elastomeric material. It is difficult to envision a diaphragm of an elastomeric material having two stable equilibrium positions where both have substantially the same shape, merely one being the inverse of the other.

There is no teaching or suggestion in Jorgensen for a diaphragm having a second equilibrium position which provides a shape that is substantially the same as the shape of the device in the first equilibrium position and the device will hold the second equilibrium position until **manual** manipulation returns the device to the first equilibrium position. Indeed, there is no suggestion that the Jorgensen diaphragm can be manually manipulated from one equilibrium position to a second equilibrium position.

Jorgensen also fails to disclose or suggest a diaphragm having a center portion with a substantially planar peripheral portion surrounding the center portion wherein the center portion has a concave first lower surface and a convex first upper surface. The diaphragm is shown only in the transducer; that a flat sheet of elastomeric material has an appearance when assembled in a toggle mechanism in the transducer does not suggest anything about the structure of the sheet prior to assembly (i.e., when hand-held).

With respect to claim 17, many polymeric films are transparent. It is not inherent that a diaphragm made of a polymeric substance has some color.

Inherency, however, may not be established by probabilities or possibilities.” MPEP 2112(IV), citing *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999) (citations omitted) (emphasis added).

Jorgensen et al. fail to teach or suggest the presently claimed handheld amusement and stress relief device. The diaphragm of the transducer in Jorgensen et al. is moved by toggle actuators 34 and 36 based on water pressure and spring pressure. There is not even a hint of a suggestion that manual manipulation is involved or desired.

Thus, it is not seen how the present invention is anticipated by Jorgenson.

D. The pending claims would not have been obvious to one of ordinary skill in the art in view of the Jorgensen reference.

(i) Claims 2-6, 8, 9 and 16

Claims 2-6, 8, 9 and 16 have the same recitations as claim 1, discussed above. Thus, the dependent claims are patentable for at least the same reasons as discussed above.

Claim 2 recites a diameter of about 0.75 inch to about 6 inches. There is no indication of the size of the transducer pump. One of ordinary skill in the present art related to a handheld amusement and stress relief device formed of a flexible, resilient polymeric material would not be able to extract a size of the diaphragm necessary to achieve the desired results of Jorgensen. For the pumping action to be successful, it may take a diaphragm several feet in diameter. It is not seen how the presently claimed dimensions for a handheld amusement and stress relief device formed of a flexible, resilient polymeric material would have been obvious in view of Jorgensen.

Claim 3 recites that the planar peripheral lip has a width w wherein the ratio of the lip width to the diameter is not greater than $\frac{1}{4}$. Jorgensen does not even suggest that there is a planar lip on a convex/concave surface of a handheld amusement and stress relief device formed of a flexible, resilient polymeric material. The elastomeric material of Jorgensen may well be a flat sheet. It is not seen how the presently claimed dimensions for a handheld amusement and stress relief device formed of a flexible, resilient polymeric material would have been obvious in view of Jorgensen.

Claim 4 requires the ration of lip width to diameter to be in the range of $\frac{1}{30}$ to $\frac{1}{5}$. No suggestion can be found in Jorgensen. It is not seen how the presently claimed dimensions for a handheld amusement and stress relief device formed of a flexible, resilient polymeric material would have been obvious in view of Jorgensen.

Claim 5 recites that the device has a substantially uniform cross-sectional thickness t over

at least the center portion, and the ratio of t to the diameter d is not greater than about $1/10$.

There is no suggestion in Jorgensen that the thickness of the diaphragm be no greater than $1/10$ of the diameter. It is not seen how the presently claimed dimensions for a handheld amusement and stress relief device formed of a flexible, resilient polymeric material would have been obvious in view of Jorgensen.

Claim 6 requires the ratio of t to the diameter d is in the range of from about $1/80$ to about $1/20$. There is no suggestion in Jorgensen for the thickness of the diaphragm. It is not seen how the presently claimed dimensions for a handheld amusement and stress relief device formed of a flexible, resilient polymeric material would have been obvious in view of Jorgensen.

Claim 8 recites that a domed peak is formed in the center portion the peak having a height h_p relative to a plane containing the peripheral portion, and the ratio of h_p to d is not greater than about $1/3$. As aforesaid, the elastomeric material of Jorgensen may well be a flat sheet. It is not seen how the presently claimed dimensions for a handheld amusement and stress relief device formed of a flexible, resilient polymeric material would have been obvious in view of Jorgensen.

Claim 9 recites that the material for the handheld amusement and stress relief device is an ethylene-vinyl acetate polymer. Jorgensen is silent on specific materials for the diaphragm. However, the drawing suggests an elastomer. It is submitted that an ethylene-vinyl acetate polymer is not an elastomer. Further, there is no reason to believe that an ethylene-vinyl acetate polymer could be successfully used in the transducer pump of Jorgensen. It is not seen how the presently claimed polymer for a handheld amusement and stress relief device would have been obvious in view of Jorgensen.

Claim 16 recites additional polymer materials for a handheld amusement and stress relief device having the two stable conditions. It is not seen how Jorgensen's suggestion for an elastomer would have made obvious any of the polymeric materials listed in claim 16. Thus, it is not seen how the presently claimed polymer for a handheld amusement and stress relief device would have been obvious in view of Jorgensen.

E. The dependent claims on appeal are separately patentable

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As discussed above in connection with the rejections, the parameters recited in the dependent claims would not have been obvious to one of ordinary skill in the art in view of Jorgensen. Thus, the dependent claims are separately patentable.

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SUMMARY

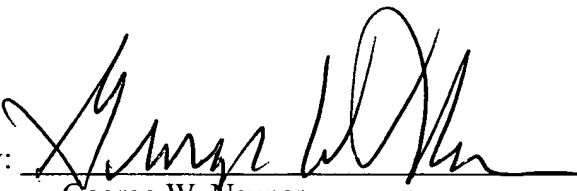
Appellants submit that all of the claims under final rejection are in condition for allowance and should be allowed, and that the Final Office Action should be vacated.

If for any reason a fee is required, a fee paid is inadequate or credit is owed for any excess fee paid, you are hereby authorized and requested to charge Deposit Account No. **04-1105**, under Reference No. 56710 (70801), Customer No. 21874.

Respectfully submitted,

Date: December 6, 2006

By:


George W. Neuner
Reg. No. 26,964

EDWARDS ANGELL PALMER & DODGE LLP
P. O. Box 55874
Boston, MA 02205

Tel. (617) 439-4444
Fax (617) 439-4170

Customer No.: 21874

CLAIMS APPENDIX

1. A handheld amusement and stress relief device formed of a flexible, resilient polymeric material consisting essentially of:

a center portion with a substantially planar peripheral portion surrounding the center portion;

the center portion having a concave first lower surface and a convex first upper surface,

the device having two stable equilibrium positions whereby manual manipulation of the device inverts the surfaces between the two stable equilibrium positions,

wherein a first stable equilibrium position comprises the first lower surface having a concave shape and the first upper surface having a convex shape and, after inversion, a second stable equilibrium position comprises the first upper surface now having a concave shape and the first lower surface now having a convex shape,

wherein the second equilibrium position provides a shape that is substantially the same as the shape of the device in the first equilibrium position and the device will hold the second equilibrium position until manual manipulation returns the device to the first equilibrium position.

2. The device of Claim 1 wherein the device is disk-shaped and has a diameter d in the range of about 0.75 inch to about 6 inches.

3. The device of Claim 2, wherein the peripheral portion comprises a lip having a width w wherein the ratio of w to d is not greater than about $1/4$.

4. The device of Claim 3, wherein the ratio of w to d is in the range of about $1/30$ to about $1/5$.

5. A handheld amusement and stress relief device formed of a flexible, resilient polymeric material consisting essentially of:

a center portion with a substantially planar peripheral portion surrounding the center portion;

the center portion having a concave first lower surface and a convex first upper surface,

the device having two stable equilibrium positions whereby manual manipulation of the device inverts the surfaces between the two stable equilibrium positions,

wherein a first stable equilibrium position comprises the first lower surface having a concave shape and the first upper surface having a convex shape and, after inversion, a second stable equilibrium position comprises the first upper surface now having a concave shape and the first lower surface now having a convex shape,

wherein the second equilibrium position provides a shape that is substantially the same as the shape of the device in the first equilibrium position and the device will hold the second equilibrium position until manual manipulation returns the device to the first equilibrium position,

wherein the device is disk-shaped and has a diameter d in the range of about 0.75 inch to about 6 inches,

wherein the device has a substantially uniform cross-sectional thickness t over at least the center portion, and the ratio of t to d is not greater than about $1/10$.

6. The device of Claim 5, wherein the ratio of t to d is in the range of about $1/80$ to about $1/20$.

7. Objected to.

8. The device of Claim 2, wherein a domed peak is formed in the center portion the peak having a height h_p relative to a plane containing the peripheral portion, and the ratio of h_p to d is not greater than about $1/3$.

9. The device of Claim 1, wherein the polymeric material is an ethylene-vinyl acetate polymer.

10. Allowed

11. Allowed

12. Allowed

13. Objected to.

14. Objected to.

15. Objected to? [The device of Claim 1, wherein the material comprises a composition that changes the color of the device upon changes in temperature or changes in other environmental conditions.]

16. The device of Claim 1, wherein the polymeric material is selected from the group consisting of fluoroplastics, polyamides, polybutylenes, thermoplastic polyesters, polyethylene

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and ethylene copolymers, silicones, thermoplastic elastomers, vinyl polymers and copolymers, and blends thereof.

17. The device of Claim 1, wherein the material is a colored resin.

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EVIDENCE APPENDIX

Tab A US 3,414,186 (Jorgensen, et al.)

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RELATED PROCEEDINGS APPENDIX

None.



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